Filed 6/5/03 In re Hector A. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re HECTOR A. et al., Persons Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. TIFFANY A., Defendant and Appellant.	F042005 (Super. Ct. Nos. JD095503 & JD095504) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Peter Warmerdam, Juvenile Court Referee.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant.

B.C. Barmann, Sr., County Counsel, and Jennifer L. Thurston, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J., Cornell, J., and Gomes, J.

Tiffany A. appeals from orders terminating her parental rights (Welf. & Inst. Code, § 366.26) to her sons, Hector and Jason.[1] She contends the court erred when it denied, without a hearing, her petition to reopen reunification services (§ 388). According to appellant, the court incorrectly believed it could not reinstate services on the eve of the termination hearing. She further complains the court erred by not finding termination would be detrimental to the boys' best interests. On review, we disagree and will affirm.

PROCEDURAL AND FACTUAL HISTORY

In January 2002, the Kern County Superior Court adjudged five-and-one-half year-old Hector and three-year-old Jason dependent children of the court and removed them from appellant's custody. The court previously determined the boys came within its jurisdiction under section 300, subdivision (b) due to their mother's inability to provide for their care as a result of her substance abuse.

Despite seven months of reasonable reunification services, appellant failed to complete any component of her case plan. Consequently, the court terminated reunification services and set a section 366.26 hearing for late November 2002 to select and implement a permanent plan for the two boys.

Less than a month before the scheduled section 366.26 hearing, appellant filed a petition for modification (§ 388) seeking to reopen reunification services. She alleged her circumstances had changed since the order terminating services in that she was actively participating in the previously ordered services to the extent possible. She further claimed reinstatement of services was in her sons' best interests because it would give them a realistic chance of a permanent and stable home with her. She added that prior to the order terminating services, the boys had been in three placements.

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

The court denied appellant's petition without a hearing adding that it "may not grant the relief requested."

Nevertheless, at the subsequent section 366.26 hearing, it considered evidence on a range of issues, including appellant's previous claim that the court should reopen reunification services and her contention that the boys would benefit from a continued relationship with her such that termination would be detrimental. At the hearing's conclusion and given the undisputed evidence of the minors' adoptability, the court terminated parental rights.

DISCUSSION

I. *Denial of Appellant's Petition for Modification*

Appellant contends the trial court violated her due process rights by arbitrarily denying her a hearing on her petition to reopen services. She assumes that the court, in commenting that it "may not grant the relief requested," believed it was powerless to grant her petition and therefore did not exercise its discretion. Respondent Kern County Department of Human Services counters any error was harmless because the court considered evidence on the section 388 petition at the section 366.26 hearing. On that record, respondent argues the court properly exercised its discretion by denying her petition. On review, we conclude appellant's petition did not state a prima facie case for relief. Thus, the court did not err by denying the petition without a hearing. Consequently, we need not consider the evidence presented in this regard at the section 366.26 hearing.

A parent may petition the court to modify a prior dependency order on grounds of change of circumstance or new evidence. (§ 388, subd. (a).[2]) The parent, however, must

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[2] Section 388 provides in pertinent part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly

also show that the proposed change would promote the best interests of the child. (§ 388, subd. (b); Cal. Rules of Court, rule 1432(c).) Whether the juvenile court should modify a previously made order rests within its discretion and its determination may not be disturbed unless there has been a clear abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

To trigger the right to a full hearing on a section 388 petition, the petitioning party must make a prima facie showing for relief. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) If the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) The petition must be liberally construed in favor of its sufficiency. (*Ibid.*; see also Cal. Rules of Court, rule 1432(a).)

Having reviewed the record as summarized above, we find no error. To begin, the juvenile court's reasoning is not a matter for this court's review. (*Davey* v. *Southern Pac. Co.* (1897) 116 Cal. 325, 329.) It is judicial action and not judicial reasoning which is the proper subject of appellate review. (*El Centro Grain Co.* v. *Bank of Italy Nat. Trust & Savings Assn.* (1932) 123 Cal.App. 564, 567.)

> appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction. [¶] . . . [¶]
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> "(c) If it appears that the best interests of the child may be promoted by the proposed change of order, recognition of a sibling relationship, or termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the persons and by the means prescribed by Section 386, and, in those instances in which the means of giving notice is not prescribed by those sections, then by means the court prescribes."

Further, we disagree with appellant's assumption that the court believed it was powerless to grant her petition. Rather, as we read the record, the court simply explained that it could not grant the relief she sought based on her failure to make a sufficient showing.

We assume, for the sake of her argument, appellant made a prima facie showing of changed circumstances. However, we conclude that she failed to show renewed reunification services was in her sons' best interests. (§ 388, subd. (c).) According to her petition, reinstatement of services was in her sons' best interests because it would give them a realistic chance of a permanent and stable home with her. However, her claim was nothing more than mere conclusion. She offered no evidence to support her conclusion, that is, no explanation of how services would give the boys a realistic chance of a permanent and stable home with her. This will not suffice for the requisite prima facie showing. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.)

> "The references in *In re Marilyn H., supra*, 5 Cal.4th at page 310, to a 'prima facie' showing is not an invitation to section 388 petitioners to play 'hide the ball' in pleading changed circumstances or new evidence. A 'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719, fn. 6.) If a petitioner could get by with general, conclusory allegations, there would be no need for an initial determination by the juvenile court about whether an evidentiary hearing was warranted. In such circumstances, the decision to grant a hearing on a section 388 petition would be nothing more than a pointless formality." (*In re Edward H., supra,* 43 Cal.App.4th at p. 593.)

Additionally, appellant's best interest allegation would not sustain a finding that the minors' need for permanency and stability would be advanced by an order for resumed services. (*In re Stephanie M., supra,* 7 Cal.4th at p. 317.) By the time the court denied appellant's petition, reunification was no longer the goal of these proceedings. At this point, appellant's interest in the care, custody and companionship of her children was no longer paramount. Rather, the focus shifted to the children's need for and entitlement

to permanency and stability. (*In re Stephanie M., supra,* 7 Cal.4th at p. 317.) In fact, there is a rebuttable presumption that continued out-of-home care is in the best interests of the child. A court hearing a parent's section 388 petition at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child. (*Ibid.*) In this case, simply put, appellant's allegation did not establish that her sons' need for permanency and stability would be advanced by an order resuming services.

Because appellant failed to make a prima facie showing that resumption of reunification services was in the boys' best interests, we conclude the juvenile court did not err by denying appellant's petition without the benefit of a hearing.

II. ***Continued Relationship***

Appellant also contends the court should have selected a permanent plan other than adoption. In particular, she argues she presented substantial evidence to support her claim that she maintained regular visitation and contact with the minors and that they would benefit from a continued relationship. Therefore, in her estimation, she was entitled to a finding that termination of her parental rights would be detrimental to the children. We disagree both as to the standard of review and appellant's claim of error.

If there is clear and convincing proof of adoptability, a point which is uncontested here, the statutory presumption is that termination is in a dependent child's best interests and therefore not detrimental. (§ 366.26, subd. (b); see also *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1344.) In other words, the decision to terminate parental rights at the section 366.26 hearing is virtually automatic if the child is going to be adopted. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) Although section 366.26, subdivision (c)(1) acknowledges that termination would be detrimental under specifically designated circumstances, a finding of no detriment is not a prerequisite to the termination of parental rights. (*Ibid.*) When a juvenile court rejects a detriment claim and terminates parental rights, the issue on review is whether the juvenile court abused its discretion.

(*Id.* at p. 1351.) Therefore, we do not review the record, as appellant argues, for sufficient evidence that termination of the parents rights would not be detrimental.

The record supports the juvenile court's exercise of discretion in rejecting the mother's claim of detriment. (*In re Stephanie M., supra,* 7 Cal.4th at p. 318.) Once again, we will assume, for the sake of appellant's argument, that she maintained regular visitation and contact with her young sons. In addition, there was evidence that the visits, which most recently occurred once a week for two hours, were pleasant experiences for the boys. The older child, Hector, appeared to know that Thursday was the scheduled day for visits and would ask the foster mother on Thursdays whether he and Jason were going to see their mother that day. The boys and appellant shared hugs and kisses during the visit although there was conflicting evidence as to whether appellant or the boys initiated these displays of affection.

Despite the evidence of the generally pleasant visits between appellant and her sons, there was no evidence introduced that Hector and Jason would benefit from a continued relationship with their mother or would suffer any significant detriment if parental rights were terminated.

> "The existence of interaction between natural parent and child will always confer some incidental benefit to the child. Nevertheless, the exception in section 366.26, subdivision (c)(1)(A), requires that the parent-child relationship promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) A juvenile court must therefore: 'balance[] the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' (*Id*. at p. 575.)" (*In re Lorenzo C., supra,* 54 Cal.App.4th at p. 1342.)

With these rules of law in mind and given the record on appeal, we conclude the juvenile court properly exercised its discretion in rejecting appellant's claim of detriment.

DISPOSITION

The orders terminating parental rights are affirmed.